

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 22/07/2004

Coram

The Hon'ble Mr. Justice P.D.DINAKARAN
and
The Hon'ble Mr. Justice N.KANNADASAN

O.S.A.No.140 of 1999

A.Manonmani .. Appellant

-Vs-

A.Sivasubramanian .. Respondent

This Appeal is preferred against the judgment and decree of this Court dated 3.12.1998 in TOS No.11 of 1995.

!For Appellant : Mrs.Sujatha Rangarajan

^For Respondent : Mr.A.Shanmugavel for
Mr.V.K.Kumarasamy

:JUDGMENT

N. KANNADASAN, J.

The appellant is the 7th respondent in O.P.No.565 of 1994 and caveator/defendant in T.O.S.No.11 of 1995 and the respondent is the petitioner in Original Petition and plaintiff in the suit.

2. The respondent has filed a petition for the grant of probate in respect of a Will executed by his father by name Arasakumar on 1.7.1987. The said petition is filed contending that his father Arasakumar has executed the Will on 1.7.1987 bequeathing the land and the Tin shed in Door No.159, Chellappa Street, Otteri, Madras-12 in favour of the wife and children of the executor's pre-deceased son Velmyil and appointing the respondent herein as executor, who shall administer the property till the minor children of the abovesaid Velmyil attained majority. It is further contended that Arasakumar has executed the Will in a sound state of mind and in the presence of witnesses.

3. The said petition was resisted by the appellant/7th respondent by filing a caveat. A written statement was filed contending that the Will was not executed by the testator, since he was 80 years old at the time of execution of the Will and not having sound mental and physical capacity to make such deposition and the Will was a forged and fabricated one and the

signatures were obtained in blank papers and the Will was obtained by the plaintiff by using undue influence and coercion. It is further contended that one of the respondents viz., one Kamala was of unsound mind and cannot act independently and as such, the consent affidavit obtained from her in the probate proceedings cannot be acted upon.

4. The learned Judge, by judgment and decree dated 3.12.1998, has granted the probate in favour of the plaintiff/respondent herein. Aggrieved against the said judgment and decree, the above appeal is filed.

5. The learned counsel for the appellant has raised several contentions as set out in the memorandum of grounds of appeal. Even though she has raised various contentions, she has specifically pleaded that the learned Judge has overlooked the specific pleading in the written statement that the appellant's sister V.Kamala was mentally ill for several years and she cannot act independently, a consent affidavit had been obtained from her which should not be acted upon and accordingly the judgment and decree is liable to be set aside. The learned counsel further contended that when a specific plea is raised in the written statement about the unsound mind of one Kamala, the learned Judge ought to have followed the procedure envisaged in this regard while disposing of the matter.

6. Per contra, the learned counsel for the respondent contended that it was not seriously urged before the learned Judge about the mental state of the abovesaid Kamala and in fact according to him, the said Kamala cannot understand things occasionally viz., with lucid intervals and otherwise, she can understand things and can act independently. The learned counsel also placed reliance upon the following decisions viz.:-

(i) Janki Narayan Bhoir vs. Narayan Namdeo Kadam (2003 (1) CTC 308),
(ii) Uma Devi Nambiar and Others vs. T.C.Sidhan (Dead) (2004 (2) L.W.852),
(iii) Ramabai Padmakar Patil (dead) through L.Rs. And Others vs. Rukminibai Vishnu Vekhande and Others (2004 (1) L.W.584), and
(iv) Dr.Shantha vs. Sharada (2003 (4) CTC 470),
and contended that the Will has been proved in accordance with law, particularly in terms of the principles laid down in the decisions referred supra.

7. We have considered the rival contentions of the parties.

8. The point for determination is:

"Whether the judgment and decree of the learned Judge is sustainable in law?

9. On a perusal of the material evidence available on record, it is seen that a specific pleading is raised by the appellant in the written statement filed in the suit to the effect that the third defendant viz., Kamala, who is the sister of the appellant, is mentally ill for a long time and cannot act independently. In the crossexamination of the respondent, who gave evidence as PW.1, the following statement is elicited:

"My sister-in-law, wife of younger brother did not leave our family she is still with us i.e. she lives in her father's house at Washermanpet.

Kamala is one of our sisters only some times affected by mental disorder. My sister Kamala since 1967 she is lucid intervals.

.. .. .

The consent affidavits of my sisters have been filed along with the Original Petition."

10. A perusal of the above makes it clear that the respondent/plaintiff is fully aware of the fact that one of his sister viz., Kamala is affected by mental disorder. Even though an attempt is made by him to the effect that the said Kamala is affected by mental disorder only at lucid intervals, the fact remains that a specific pleading was raised by the appellant herein about the state of mind of the abovesaid Kamala and necessary questions were also put in the course of cross-examination. When the facts are like this, it is not known as to why the respondent/plaintiff has not availed the procedure available under Order 32 of Civil Procedure Code. Order 32 deals with suits by or against minors and persons of unsound mind. Order 32 Rule 15 proceeds as follows:-

"15. Rules 1 to 14 (except Rule 2A) to apply to persons of unsound mind - Rules 1 to 14 (except Rule 2A) shall, so far as may be, apply to persons adjudged before or during the pendency of the suit, to be of unsound mind and shall also apply who, though not so adjudged, are found by the Court on enquiry to be incapable, by reason of any mental infirmity, of protecting their interest when suing or being sued."

11. A perusal of the above discloses that Order 32 Rules 1 to 14 (except Rule 2-A) shall apply to persons of unsound mind. Order 32 Rule-3 contemplates a filing of an application for the appointment of guardian. In the instant case, the respondent/plaintiff has not discharged the initial burden of filing such application, even though he is aware of the fact that one of his sister Kamala is affected by mental disorder. Since a consent affidavit is obtained from one such person against whom a specific allegation is made that she is of unsound mind and in the evidence, the plaintiff himself has admitted that the said Kamala is affected by mental disorder, the learned Judge ought to have framed the issues as to whether the abovesaid Kamala is in a position to act independently or not? and as to whether the appointment of guardian is necessary or not?. Admittedly, the Will does not provide any share in the property to the abovesaid Kamala. Inasmuch as no provision is made in the Will bequeathing any share in the property in question and when serious allegation is made that the Will was not executed by the executor in a sound mind and the same has been obtained by using undue influence and coercion by the plaintiff, necessary finding should have been rendered by the learned Judge in this regard.

12.1. Order 32 of the Code of Civil Procedure deals with suits by or against minors and persons of unsound mind.

12.2. Order 32 Rule 15 of the Code of Civil Procedure extends the application of Order 32 Rule 1 to 14 of the Code of Civil Procedure, except Rule 2A, to the persons adjudged before or during the pendency of the suit, to be of unsound mind and shall also apply to persons who, though not so

adjudged, are found by the Court on enquiry to be incapable, by reason of any mental infirmity, of protecting their interest when suing or being sued.

12.3. The words employed in the legislature, namely persons who are found by the Court on enquiry to be incapable of protecting their interest when suing or being sued, found in Order 32 Rule 15 of the Code of Civil Procedure make it clear that a duty is cast on the Court to arrive at the finding whether on the pleadings or even in the absence of any pleading when it is brought to the notice of the Court by the evidence on record whether any persons is found by the Court, on enquiry to be incapable of protecting his or her interest, when suing or being sued, and such duty, in our considered opinion, is mandatory but not discretionary. Any deviation from the above rule would render Order 32 Rule 1 to 14 of the Code of Civil Procedure redundant, inasmuch as the Court is expected to be a guardian of interest of the minors and persons of unsound mind who are incapable of protecting their interest.

12.4. If the Court is satisfied that the defendant is either a minor or a person of unsound mind or a person incapable of protecting his or her interest when suing or being sued, a further duty is cast on the Court itself to decide who could be a proper person to be appointed as a guardian ad litem for an effective representation of the case on behalf of the a minor or a person of unsound mind.

13. As the above burdened obligation of the Court was not discharged and a specific finding with regard to the allegations about the unsound mind of one of the defendants by name Kamala has not been rendered by the learned single Judge, without going into the various other contentions urged by the learned counsel for the appellant, we are inclined to set aside the judgment and decree of the learned Judge.

14. Even though the learned counsel for the respondent has cited various judgments referred to supra, the said decisions do not have any relevance in the light of the fact that the mandatory required under Order 32 CPC was not complied with.

15. For the reasons stated above, we are setting aside the judgment and decree of the learned Judge and the matter is remitted back for fresh consideration in the light of what is stated above. Accordingly, the appeal is allowed to the extent indicated above. The parties are at liberty to make a request to the concerned learned Judge for early disposal of the suit. No costs.

Internet : Yes

Index : Yes

Svn/sasi

To

The Sub Assistant Registrar,

Original Side, High Court,
Madras-104.

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